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No. 00-677

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

LINDA PLACE,
Petitioner,

v.

ABBOTT LABORATORIES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether the Seventh Circuit's fact-bound application of well settled principles under FRCP 50, as recently restated by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, to Abbott's motion for judgment as a matter of law in this case requires the exercise of this Court's certiorari jurisdiction.

LIST OF PARTIES AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

In accordance with this Court's Rules 14.1(b) and 29.6, Respondent states that the parties to the proceeding in the Seventh Circuit are those in the caption of the case in this Court. Respondent further states that Abbott Laboratories has no parent companies and no publicly-traded company owns ten percent or more of the stock of Abbott Laboratories.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent Abbott Laboratories submits this brief in opposition to the petition for writ of certiorari filed by the petitioner, Linda Place. The opinions below and the statutory provisions involved are correctly set out in the petition.

JURISDICTION

The United States Court of Appeals issued its decision in this case on June 1, 2000. On June 9, 2000, the Seventh Circuit granted Petitioner Linda Place's motion for extension of time until July 17, 2000, to file a petition for

rehearing. On June 30, 2000, Place filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On July 27, 2000, the Seventh Circuit denied Place's Petition for Rehearing and Suggestion for Rehearing En Banc. All judges on the original panel voted to deny rehearing, and none of the judges in active service on the Seventh Circuit Court of Appeals requested a vote on the petition for rehearing en banc. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Course Of Proceedings And Dispositions Below

Petitioner Linda Place sued Abbott Laboratories, her former employer, for damages under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*[1] She relied on the Civil Rights Act of 1991 ("CRA"), which amended Title VII effective November 21, 1991 to allow for recovery of compensatory and punitive damages, within prescribed caps, and for jury trials in cases where such damages are sought. 42 U.S.C. § 1981a. She alleged, among other things, that she had been sexually harassed while employed at Abbott and that Abbott had retaliated against her for complaining about her alleged harasser. *Place v. Abbott Laboratories*, 215 F.3d 803, 806 (7th Cir. 2000). Place's Second Amended Complaint initially included five counts, all of which were disposed of in Abbott's favor prior to trial except Place's sexual harassment and retaliation claims. *Id.*; App. B-1-12, 33-34. At a trial held between December 9, 1997 and December

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[1] References to the record before the Court of Appeals will be as follows: to Abbott's Required Short Appendix: "App. A-__"; to Abbott's Separate Appendix: "App. B-__"; to the Transcript of Proceedings, "Tr. __."

18, 1997, the district court judge acted as fact finder as to Place's sexual harassment claim and a jury acted as fact finder as to her retaliation claim. In a 34-page Memorandum Opinion, the district court found Place had not been sexually harassed at Abbott, that Place's sexual relationship with her then supervisor (Charles Harrington, Ph.D., who was not Mrs. Place's husband) was consensual, and that Place had not been subjected to a hostile environment. *Place*, 215 F.3d at 806; App. A-9-42. In making these findings, the district court repeatedly found that Place was not a credible witness. *Id.*; App. A-4, 6, 8, 11, 16-17, 32-33, 35. In accordance with its findings, the district court entered judgment in favor of Abbott on Place's sexual harassment claim. Place did not appeal this judgment. *Place*, 215 F.3d at 806.

The jury, in contrast, found that Abbott had retaliated against Place. The jury's verdict, although unexplained, presumably was based on Place's claims that she suffered the following retaliatory acts: (1) on October 21, 1991 (prior to the enactment of the CRA) Abbott transferred Place and Harrington to different positions in an effort to alleviate work-related difficulties caused by their soured affair, App. A-16-17; and (2) in May, 1992 (after the enactment of the CRA), Abbott's health department advised Place that she was required to complete an independent medical examination ("IME") before she would be allowed to return to work from a self-imposed disability leave. *Id.* at 807. Place refused to participate in the IME and consequently, in November, 1992, she exhausted her 12-month disability leave without returning to Abbott and was terminated in accordance with Abbott's long-standing disability leave policy. *Id.* at 806.

Before and after the jury's verdict, Abbott filed a Rule 50 motion arguing, *inter alia*, that: (a) as a matter of

law, Place was not entitled to recover damages for, or have a jury trial on, alleged adverse employment actions occurring before November 21, 1991 (the effective date of the CRA), Tr. 838, 1113-18; App. B-65-66, 70-75; (b) the district court erred as matter of law in applying the "continuing violation" doctrine to effect retroactive application of the CRA, *Id.*; and (c) Place had failed to present a legally sufficient evidentiary basis for a reasonable jury to conclude that Abbott had retaliated against her in a manner proscribed by law, Tr. 838-42, 1113-18; App. B-53-65. The district court denied Abbott's motions and entered judgment on the jury verdict in favor of Place in the amount of $514,656.01.[2] *Place*, 215 F.3d at 806.

Abbott appealed the jury's verdict and, in a unanimous panel opinion issued June 1, 2000, the Seventh Circuit Court of Appeals reversed the judgment in favor of Place, and remanded with instructions for the district court to enter judgment in favor of Abbott on Place's retaliation claim. *Place*, 215 F.3d 803. Specifically, the unanimous panel held that the district court committed reversible error by allowing the jury to consider and award damages for alleged retaliatory conduct that preceded the enactment of the CRA. *Id.* at 808-09. The district court had reasoned that the pre-CRA and post-CRA allegations formed a "continuing violation," which could properly be submitted in its entirety for jury decision. The Seventh Circuit disagreed, concluding the pre-CRA and post-CRA actions were not a continuing violation, but were separate and distinct. *Id.* Thus, there was no basis for submitting the pre-CRA allegations to the jury in contravention of

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[2] The jury's award was broken into two components: (1) $389,565.00 for lost wages and benefits; and (2) $125,000.01 in compensatory damages.

established law that the CRA does not enjoy retroactive application. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 252 (1994). Place does not seek review in this Court on this issue.

The Seventh Circuit further held that no reasonable jury could have found that Place's pre-CRA transfer or Abbott's post-CRA IME requirement constituted unlawful retaliation for Place's sexual harassment complaints made many months earlier. *Place*, 215 F.3d at 809-11. Therefore, the court held that the district court should have granted Abbott's Rule 50 motion. *Id.* In support of this holding, the Seventh Circuit relied on a wealth of uncontroverted facts, which are succinctly stated in the court's unanimous panel opinion.

B. Statement Of Facts

As found by the Seventh Circuit, Place's workplace difficulties at Abbott began when she and her then supervisor Dr. Charles Harrington "got drunk at a company Christmas party in December 1990 and afterward found their way into the same hotel bed." *Place*, 215 F.3d at 805. While Place claimed this sexual encounter with Harrington was coerced, the district court found otherwise, expressly discrediting Place's testimony on this and other subjects. *Id.* at 806; App. A-4, 6, 8, 11, 16-17, 32-33, 35. Place and Harrington's post-Christmas party encounter marked the commencement of an extended liaison. *Place*, 215 F.3d at 805-06. While Place could not recall on how many occasions or when she and Harrington actually stopped having sexual relations, she did recall their sexual encounters continued for at least four to six months and occurred both at and away from the workplace, and including at her husband's condominium and during a weekend she spent with Harrington in Chicago. *Id.*

In the Spring of 1991, Place was promoted from a grade 13 to a grade 15 scientist. *Id.* at 806. Also, as part of a routine progression of her project, Place was transferred to a different group where she reported to Meta Franklin instead of Harrington. *Id.* Place continued to work with Harrington albeit less frequently and on a co-worker level, as opposed to a supervisor/subordinate level. *Id.*; Tr. 140, 467-68, 501, 548-50, 881; App. A-19.

In July, 1991, Place complained to Abbott's employee relations department that Harrington was sexually harassing her. *Place*, 215 F.3d at 806; Tr. 176-77, 295-96, 628, 634. Specifically, Place reported that she and Harrington had been involved in a "relationship," that she had been trying to end their relationship, and she believed as a result, that Harrington was being uncooperative and "almost hostile" toward her in their working relationship. Tr. 176-78, 295-96, 641; App. B-255-57. Place did not complain that Harrington had coerced her into having or continuing their relationship. Tr. 639, 645-46, 688-89.

Abbott immediately conducted an investigation of Place's claims, which culminated in a meeting with Harrington at which Harrington was reminded of Abbott's policy prohibiting sexual harassment, and warned under threat of discipline and possible termination not to engage in harassing or intimidating behavior in the future. *Place*, 215 F.3d at 806; Tr. 652-54, 658, 813-14, 883-84; App. B-315. Abbott's employment relations manager told Place that Harrington had been warned not to engage in harassing behavior. Tr. 180-82, 659. Abbott also instituted a protocol by which Place interacted with Harrington only through or in the presence of Franklin. *Id.* Not long after, however, Place complained that communicating through Franklin was too cumbersome. Tr. 182, 660-61, 666. Accordingly,

Abbott approved Place's request to recommence direct communications with Harrington. Tr. 666.

As the Seventh Circuit found, throughout this time period, Place was a "tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers." *Place*, 215 F.3d at 809. Franklin, whose testimony was specifically credited by the district court, App. A-21, testified that the project suffered from general communications problems, at least some of which were attributable to Place's poor interpersonal skills. Tr. 501, 549, 553, 563. For instance, Franklin cited an incident shortly after Place transferred to Franklin's group where one or more employees complained to Franklin about Place making a derogatory comment about the group's work space. Tr. 472-73, 479-80. On other occasions, Franklin witnessed or fielded complaints about Place's confrontational and demanding demeanor. *Place*, 215 F.3d at 809; Tr. 553-55.

When Franklin brought these problems to Place's attention, Place complained that she was stressed and overworked. Tr. 553-55. Consequently, Franklin told Place to scale back her hours and schedule a vacation, emphasizing that it was critical that Place improve her interpersonal skills and relationships with her co-workers. Tr. 555. Consistent with these instructions, when Place requested permission to attend an off-site meeting a few weeks later, Franklin granted Place permission to attend only a half day of the meeting so that her work demands would not pile up. Tr. 554-57. Place reacted angrily, leaning toward Franklin and threatening that Franklin would "pay for" her decision not to allow Place to attend the entire meeting. *Place*, 215 F.3d at 809; Tr. 554-60. Franklin also saw Place threaten co-worker Peggy Connerty, with whom Place had ongoing problems, and

who Place had previously described to Franklin as "incompetent." *Id.*

Place also continued to have problems working with Harrington. She complained repeatedly that Harrington was "non-cooperative" until October 21, 2000, when she announced that she no longer wanted to work with Harrington on their project. Tr. 197-98, 207-09, 606-07. Abbott obliged Place's request by transferring Place and Harrington to new positions. *Place*, 215 F.3d at 806; Tr. 212-13, 614-15, 684-85, 886-87. Neither Place nor Harrington suffered a reduction in pay, benefits, or job grade, which are the only criteria used at Abbott for comparing positions within the company. *Place*, 215 F.3d at 810; Tr. 618-19, 718-23, 727-30. In fact, Place was transferred to a vacant position on a different project that had previously been performed by a grade 17 scientist (Place was a grade 15 scientist). *Place*, 215 F.3d at 810; Tr. 745. Nevertheless, both Place and Harrington perceived their transfers as demotions. Tr. 217, 817-18, 920. Place in particular believed her new position was inferior because she had to do more lab work (she was a scientist) and because she no longer had the same supervisory responsibilities. *Place*, 215 F.3d at 810; Tr. 217.

After her transfer, Place put herself on an indefinite medical leave, at full salary, beginning November 17, 1991. *Place*, 215 F.3d at 806; Tr. 229, 958; App. B-265, 311-14. After six months of leave, and as her continued full salary benefits were due to run out, Place obtained a note from her doctor (a psychologist) stating, "Linda Place is planning to return to work on Friday, May 15, 1992." *Place*, 215 F.3d at 806; App. B-260. Upon receipt of this note, Abbott's Director of Corporate Employee Health (Brockton Weisenberger, M.D.) spoke with Place's doctor (with

Place's permission). Tr. 237-39, 758-62; App. B-258-59. Dr. Weisenberger also met with Place's managers and with Place individually. *Id.* While meeting with Place, Dr. Weisenberger took note of the fact that Place "ha[d] a note pad with her and appear[ed] to be actively taking notes of everything said during the conversation." *Id.* Place had previously requested to tape record all conversations she had with health department personnel. *Id.* In light of Place's paranoid behavior, and in an effort to confirm that she was well enough to return to work, Dr. Weisenberger decided that Place should undergo an IME. *Id.* When Dr. Weisenberger shared this decision with Place's personal psychologist, Place's doctor responded that she understood Abbott's concerns and desire for a second opinion. *Place*, 215 F.3d at 809; Tr. 237-39, 758-62; App. B-258-59.

Abbott referred Place to Lake Cook Psychologists (not affiliated with Abbott) where she was scheduled to see Dr. John Jochem for an IME. *Place*, 215 F.3d at 806; Tr. 240, 326; App. B-297, 329-30. For several months and despite Abbott's persistent prodding, Place refused to see Dr. Jochem. Tr. 241-43, 248-49, 328-29; App. B-294, 297-300. Finally, on August 20, 1992, she reported to Dr. Jochem's office where, before the examination began, Place took out a tape recorder and began recording everything. *Place*, 215 F.3d at 806; Tr. 251-52, 713. When Dr. Jochem objected to the tape recorder, Place walked out of his office without participating in the IME. *Place*, 215 F.3d at 806; Tr. 253-55, 713, 718; App. B-294, 296, 316-17, 327-28. Thereafter, she never rescheduled another appointment with Dr. Jochem. *Id.*

Abbott eventually terminated Place on December 2, 1992 pursuant to Abbott's Personnel Policy No. 184, which provides that an employee on a disability leave of absence will be separated from the Company upon the date on

which her total leave exceeds one year. *Place*, 215 F.3d at 806; Tr. 960-62, 970-71, 1111; App. B-266-68, 308-10. It was undisputed that Abbott's policy is applied uniformly and that numerous other employees have been terminated for the same reason. *Id.*

C. The Seventh Circuit's Decision, Place's Petition For Rehearing And Suggestion For Rehearing En Banc, And The Seventh Circuit's Denial Of Same

In considering Abbott's appeal of the jury's verdict, the Seventh Circuit recognized the limits of its role under FRCP 50. Specifically, the court framed the issue on appeal as "whether a rational jury could have reached the result this jury reached." *Place*, 215 F.3d at 808. In undertaking its analysis, the court acknowledged that it could not "substitute [its] view of contested evidence for the jury's." *Id.* Additionally, the court cited its prior precedent, which states that the inquiry under FRCP 50 is limited to "'whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.'" *Id.*, *citing*, *Mathur v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938, 941 (7th Cir. 2000).

After identifying the standard of review under FRCP 50, the Seventh Circuit applied that standard in straightforward fashion to the facts presented in this case. Based on the foregoing facts, the Seventh Circuit concluded that no reasonable jury could have found that Abbott's decision to transfer Place in October, 1991, or to require an IME before allowing Place to return to the workplace from her self-imposed disability leave in May, 1992, constituted actionable retaliation for Place's sexual harassment complaints made almost a year prior. *Place*,

215 F.3d at 809-11. Accordingly, the unanimous Seventh Circuit panel opinion reversed the jury verdict for Place, and remanded with instructions for the district court to enter judgment for Abbott on Place's retaliation claim. *Id.*

Following the Seventh Circuit's decision, Place filed a Petition for Rehearing and Suggestion for Rehearing En Banc, in which she presented to the Seventh Circuit all of the arguments she now presents to this Court. Indeed, the instant Petition for Writ of Certiorari is drawn verbatim from Place's Petition for Rehearing in significant part. Specifically, Place argued to the Seventh Circuit, as she does in the instant Petition for Writ of Certiorari, that "the panel erred by bending the record in favor of Abbott, citing self-interested defense testimony that a jury already rejected, in violation of *Reeves v. Sanderson Plumbing Prods.*" Pet. for Rehearing, 7. Accordingly, Place requested reconsideration of the panel's unanimous decision, and suggested reconsideration by the Seventh Circuit en banc, in light of this Court's decision in *Reeves*. The Seventh Circuit denied Place's Petition for Rehearing. All of the judges on the original panel voted not to rehear the case, and no judge in active service on the Seventh Circuit called for a vote on Place's request for rehearing en banc.

ARGUMENT

This case offers no special or important reason for a grant of the requested Writ of Certiorari. The Seventh Circuit's decision is a straightforward, fact-bound application of settled law to the particular facts of this case. Contrary to Place's contentions, the Seventh Circuit's decision represents no divergence from the pronouncements of this Court. Moreover, the FRCP 50 principles that form the basis of Place's petition do not raise unsettled questions of federal law and procedure. Rather,

the Seventh Circuit's decision in this case applied well-established Rule 50 principles in a manner wholly in accord with this Court's recent decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, __ U.S. __, 120 S. Ct. 2097 (2000).

I. THE SEVENTH CIRCUIT'S OPINION CORRECTLY APPLIED ESTABLISHED FRCP 50 PRINCIPLES, CONSISTENT WITH THIS COURT'S RECENT DECISION IN *REEVES v. SANDERSON PLUMBING PRODS., INC.*

Place's petition for writ of certiorari is grounded on the proposition that this Court in *Reeves* drastically altered the legal landscape as it pertains to the standard of review under Rule 50. From this faulty proposition, Place argues that the Seventh Circuit erroneously applied these allegedly new standards in its review of the particular facts of this case. Place is incorrect on both counts.

A. *Reeves* Did Not Make New Law

In *Reeves*, 120 S. Ct. 2097, the plaintiff claimed his employer fired him because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). At trial, the district court twice denied the defendant employer's motion for judgment as a matter of law under Rule 50 before properly instructing the jury that "[i]f the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." *Id.* at 2097.

The jury returned a verdict for the plaintiff, and the district court thereafter denied the defendant's renewed motion for judgment as a matter of law. On appeal, the Fifth Circuit Court of Appeals reversed, holding that the plaintiff had not introduced sufficient evidence to sustain the jury's finding of age discrimination. Critically, the Fifth

Circuit allowed that the plaintiff "very well may have" presented sufficient evidence for a "reasonable jury [to] have found that [the respondent's] explanation for its employment decision was pretextual." *Id.* The Fifth Circuit further explained, however, that it did not consider this evidence, standing alone, to be dispositive of the ultimate issue — *i.e.*, whether plaintiff presented sufficient evidence to permit a reasonable determination that he was terminated because of his age. *Id.*

This Court granted certiorari to resolve a compelling issue of employment law that had divided the federal Courts of Appeals — namely, "whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." *Id.* Disagreeing with the Fifth Circuit, this Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification [for its actions] is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* 2109. The *Reeves* Court stated:

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other,

> nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Id.

Given its holding that a plaintiff's prima facie case and evidence of pretext may, but will not always support a finding of unlawful discrimination, the Court in Reeves considered whether, on the record presented, judgment as a matter of law was warranted in the employer's favor. In undertaking this further analysis, the Court identified only a "semantic" conflict among the Courts of Appeals' differing formulations as to what evidence a court is to consider in ruling on a Rule 50 motion. *Id.* at 2110. Whereas some Courts of Appeals decisions have stated that "review is limited to that evidence favorable to the non-moving party," others have held that review "extends to the entire record, drawing all reasonable inferences in favor of the nonmovant." *Id.* at 2109-10.

In resolving this semantic conflict, the Court clarified in *Reeves* that "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." The Court further stated, consistent with its prior decisions, that in reviewing the record in the Rule 50 context, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* Stated another way, the Court instructed:

> although the court should review the record as a whole, it must disregard all evidence to the moving party that the jury is not required to

> believe. See Wright and Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as to that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Id.

Applying these standards, the *Reeves* Court concluded the Fifth Circuit improperly disregarded critical evidence favorable to the plaintiff — namely the evidence supporting the plaintiff's prima facie case and establishing that the employer's stated justification was false. *Id.* at 2111. Further, the Fifth Circuit failed to draw reasonable inferences in favor of the plaintiff from additional evidence suggesting that the termination decision was impacted by the employer's age-based animus. *Id.* Therefore, the Court reversed the Fifth Circuit's decision, reinstating the jury's verdict. *Id.* at 2112.

Thus, as stated in the opinion, this Court granted certiorari in *Reeves* to resolve an important split among the federal circuits involving the so-called "pretext-plus" debate which had permeated the employment discrimination arena since the Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). *See Reeves*, 120 S. Ct. at 2104-05 (noting split in circuits as to whether prima facie case plus evidence of pretext is sufficient to create jury issue, or whether plaintiff must additionally present evidence of discrimination over and above proof of pretext). After resolving this issue, and in the course of applying its holding in *Reeves* to the facts presented, the Court identified and clarified what it termed a "semantic" distinction between the Rule 50 standards utilized in various circuit court opinions. Specifically,

Reeves confirmed that the court's role in deciding a motion for judgment as a matter of law is to review all of the evidence in the record, not just that evidence which is favorable to the nonmoving party.

Beyond this guidance, *Reeves* does not, contrary to Place's petition, alter the well settled principles governing the courts' role under Rule 50. Thus, it has long been an established part of Rule 50 jurisprudence that the court may not make credibility determinations or weigh the evidence, as those are functions reserved unto the jury. *See, e.g., Lytle v. Household Mfg., Inc.*. 494 U.S. 545, 554-55, 110 S. Ct. 1331, 1338 (1990) (stating that in deciding a Rule 50 motion, court draws all factual inferences in favor of the nonmoving party, and does not weigh the evidence or make credibility determinations); *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 696-97 & n.6, 82 S. Ct. 1404, 1409 (1962). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 106 S. Ct. 2505 (1986) (stating same ~~principle~~s in conjunction with analogous standard applicable to motions for summary judgment); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (same).

B. The Seventh Circuit Correctly Applied FRCP 50 Standards To The Particular Facts Of This Case

The Seventh Circuit's decision in this case does not deviate from *Reeves*. To the contrary, the Seventh Circuit's opinion echoes *Reeves*' articulation of the Rule 50 standard, explaining that in reviewing the district court's denial of Abbott's Rule 50 motion:

> the question is whether a rational jury could have reached the result this jury reached. [*Mathur v. Board of Trustees of S. Ill._Univ.*,

> 207 F.3d 938, 941 (7th Cir. 2000)]. In deciding this question, we may not substitute our view of contested evidence for the jury's.

Place v. Abbott Laboratories, 215 F.3d 803, 809 (7th Cir. 2000). The *Mathur* opinion, cited by the *Place* panel, is even more explicit in this regard:

> we limit our inquiry [in the Rule 50 context] to "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed. . . . In other words, we are limited to assessing whether no rational jury could have found for the plaintiff." . . . In doing so, "this court may not step in and substitute its view of the contested evidence for the jury's."

Mathur v. Board of Trustees of S. Ill. Univ., 207 F.3d 938, 941 (7th Cir. 2000).

Nowhere does the Seventh Circuit's opinion in this case make reference to, much less abrogate, the semantic distinction this Court clarified in *Reeves*. The distinction the *Reeves* opinion resolved was not presented in this case. Nor does the Seventh Circuit's unanimous panel decision purport to create new law in the Rule 50 context. To the contrary, the Seventh Circuit's opinion applies settled Rule 50 principles to the particular facts of this case.

As the Seventh Circuit held, "[t]he record does not support an inference that Abbott was retaliating against Place's earlier complaints of sexual harassment by requiring her to take an independent medical examination before returning to work from a long disability leave." *Place*, 215

F.3d at 809. In support of this holding, the Seventh Circuit relied on an abundance of uncontroverted facts:

- Place was seeking to return to work from a self-imposed disability leave prompted by emotional problems she claimed to have been caused by various aspects of her employment with Abbott. *Place*, 215 F.3d at 809.

- Abbott required any employee who had been out on disability leave for at least five days to coordinate their return to work with the company's health department. *Id.*

- While Abbott did not require every employee returning to work from a long disability leave to undergo an IME, such was not unusual. *Id.*

- Indeed, Abbott's then director of corporate employee health testified without contradiction that every year, numerous employees returning to work from disability leaves were sent for IMEs that included psychological evaluations. *Id.*

- Dr. Weisenberger's decision to require Place to undergo an IME before returning to work was premised on a legitimate, supported concern that Place was so angry with the company that she might do harm if returned to the workplace.[3] *Id.*

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[3] Place claims in her petition, as she did before the Seventh Circuit, that Dr. Weisenberger's decision to require an IME was contradicted by Abbott's manager of Corporate EAP,

- Prior to her leave of absence, Place was a "tempestuous, high-maintenance employee who did good scientific work but had regular run-ins with her supervisors and co-workers," which included on at least two occasions Place threatening a supervisor and a co-worker. *Id.*

- Place openly exhibited paranoid behavior in dealing with Abbott, including seeking to tape record meetings with Abbott management and actively writing down every word uttered by Weisenberger during their conversations. *Id.*; *see also* Tr. 759-62; App. B-258-59.

- Place's treating psychologist, who believed Place was ready to return to work, and posed no danger, acknowledged that she understood Abbott's desire to seek a second opinion via the IME. *Place*, 215 F.3d at 809.

- No competent evidence exists in the record to suggest that any employees similarly situated to Place were treated more favorably. *Id.*

Dr. Rochelle Dainas. Place supports this assertion with a citation to notes taken by Dr. Jochem, which she submits reflect admissions from Dr. Dainas that Place's return to work posed no danger to Abbott. Place's description of this evidence is materially incomplete and misleading. The excerpt from Dr. Jochem's notes cited by Place states: "Chelle [Dainas] doubts dangerousness, but is worried re: sabotaging dept. work." *See* Place's Separate Appendix to the Court of Appeals at D-127. Thus, Dr. Jochem's notes, and Dr. Dainas' concerns are entirely consistent with Dr. Weisenberger's stated reasons for requiring an IME.

- Place's sexual harassment complaints, for which she claimed the IME requirement was retaliatory, were made over almost a year before Dr. Weisenberger's decision to require an IME before allowing Place to return to work. *Id.* at 810.

- Dr. Weisenberger, who made the decision to require Place to undergo an IME, had nothing whatsoever to do with addressing or responding to the sexual harassment complaints Place nearly a year prior. Tr. 176-77, 295-96, 628, 634, 641, 652-54, 688-89, 658, 813-14, 883-84; App. B-255-57, 315.

- Place's ultimate termination was a ministerial result of her exceeding the maximum 12 months allowed under Abbott's leave policy, and was effectuated by an administrative employee who had nothing whatsoever to do with the IME requirement, or Place's prior sexual harassment complaints. *Place*, 215 F.3d at 806, 810; Tr. 970; App. B-266-68.

Similarly, the Seventh Circuit concluded that it was "dubious" whether Place's pre-CRA transfer constituted an "adverse employment action" within the meaning of Title VII. *Place*, 215 F.3d at 810. In any event, the court found "no evidence" to support Place's claim that the transfer was in retaliation for her earlier sexual harassment complaints. *Id.* Again, the Seventh Circuit's decision is amply supported by undisputed facts:

- Place's transfer did not involve a change in pay or benefits or job grade, which are the

only criteria for comparing jobs among Abbott's various operations. *Id.*

- Place was transferred to a position which was formerly performed by a higher grade scientist. *Id.*

- Abbott's business of "[r]esearching, creating, and preparing for mass production pharmaceutical products is a dynamic business that involves regularly shifting people from one job to another, as one project is completed and another is begun." *Id.*

- Thus, Place was not guaranteed to stay in the position she held prior to the transfer, and in fact, the practice at Abbott was such that Place would likely have been transferred to a new position on a new project. *Id.*

- Similarly, "[s]upervising other workers in one capacity [at Abbott] did not mean that person would always have supervisory duties thereafter." *Id.*

These facts are uncontroverted in the record. Nevertheless, Place argues the Seventh Circuit violated *Reeves* in relying on these facts because they were established through testimony offered by Abbott's witnesses. Latching onto and taking out of context a single phrase from the *Reeves* opinion, Place reads that decision to stand for the proposition that in reviewing a motion under Rule 50 (or a motion for summary judgment, given that the same standard applies), a court may *never* consider evidence from the moving party's witnesses. A fair reading of *Reeves* reveals that such was not this Court's holding.

As stated above, the *Reeves* opinion resolves a semantic distinction in the Courts of Appeals' prior articulations of the Rule 50 standard of review. *Reeves* instructs that in considering a Rule 50 motion, the court should review "all of the evidence in the record." *Reeves*, 120 S. Ct. at 2110. In doing so, the court "*should* give credence to the evidence favoring the nonmovant *as well as* that 'evidence supporting the moving party that is uncontradicted and unimpeached *at least* to the extent that that evidence comes from disinterested witnesses." *Id.* (emphasis added). Contrary to Place's contentions, nowhere does *Reeves* suggest that the *only* evidence a court may consider in the Rule 50 context is that which comes from disinterested witnesses.

Place's twisted reading of *Reeves* would turn Rule 50 on its head. Further, contrary to well established policy favoring the entry of summary judgment in cases where there are no material facts in controversy, *see, e.g., Celotex*, 477 U.S. 317, 328 (1986) (stating that summary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'") (citations omitted), Place's interpretation of *Reeves* would rule out summary judgment in the vast majority of cases in which it is now appropriate.

Indeed, this aberrant result would be particularly likely to occur in employment cases, where much of the evidence an employer is required to produce — *e.g.*, evidence of the employer's treatment of similarly situated employees — would be deemed useless in deciding summary judgment to the extent it is undisputed, but uniquely found in the company's records, or explained by the company's representatives. Similarly, in cases like this

one where material facts are equally known to the plaintiff and the employer, under Place's cramped interpretation of *Reeves*, the plaintiff could stave off summary judgment simply by refusing to testify on the point. For instance in this case, Place's supervisor Meta Franklin testified that Place had threatened her and a co-worker on separate occasions. Place could have denied these threats, but did not. Now, she faults the Seventh Circuit for relying on Franklin's unrebutted testimony. These arguments are not well-founded, as contrary to Place's claims, this Court wisely did not change existing Rule 50 law in *Reeves*.

Finally, Place criticizes the Seventh Circuit for failing to consider evidence supporting her retaliation claims. This argument is simply a fact-bound critique that the Seventh Circuit incorrectly applied the law, an allegation that even if true, is not worthy of review by this Court. In any event, the Seventh Circuit got it right. Place cites evidence of a March 17, 1992 meeting among several Abbott managers including Dr. Weisenberger, at which Place's potential return to work was discussed. Contrary to Place's claims, the Seventh Circuit did consider this meeting, as it featured prominently in Place's brief on appeal. Place deems this meeting significant because the EAP Consultation notes from this meeting state that its purpose was "re [Place's] allegation re sexual harassment." App. B-288. The Consultation notes further identify the consensus reached at the meeting, namely that "[Place] will be sent extended disability forms. Before [Place] can return to work, Emp. Health will need clear documentation that [Place] can perform her job as required." *Id.* Further, Dr. Weisenberger's notes from this same meeting relate, "Ms. McClain discusses multiple difficulties with the employee in the workplace and it is agreed that should she be released to return to work that she not be allowed to do so by Employee Health until further discussions are

conducted with Personnel and her department manager." App. B-258-59.

Presented with this evidence, the Seventh Circuit correctly concluded that it fails to constitute proof of the required "but for" causal nexus between Place's sexual harassment claims and Dr. Weisenberger's decision to require an IME. *McKenzie v. Illinois Dept. of Transp.*, 92 F.3d 473, 483 (7th Cir. 1996) ("In order to demonstrate the 'causal link' [for purposes of Title VII retaliation claim], [the plaintiff] must demonstrate that IDOT would not have taken the adverse action 'but for' the protected expression."). The evidence establishes only that Dr. Weisenberger was advised by Place's managers of the workplace difficulties that led to Place's disability leave. That Place's sexual harassment claim appears to have been mentioned briefly by way of medical background does not constitute even a scintilla of evidence of retaliation. Indeed, it would have been curious if Dr. Weisenberger, who was gathering information regarding the events that led to Place's medical leave of absence and the perceived safety issues associated with her return, had not learned of her sexual harassment claim. Equally significant, the evidence Place relies upon regarding this meeting supports Dr. Weisenberger's testimony as to the "decisions" that were made at the meeting, which were simply to offer Place extended disability benefits and to coordinate further regarding her potential return to work. These "decisions" amount to nothing more than what Abbott's practice and policy require anyway. Tr. 804-05, 963-69, 1042-43; App. B-295, 327-28, 333.

In sum, *Reeves* clarified a semantic distinction in the Courts of Appeals prior articulations of the Rule 50 standard — a distinction which was never presented in this case. *Reeves* did not create new law, but rather confirmed

well settled Rule 50 standards. The Seventh Circuit cited and correctly applied these standards in a manner wholly consistent with *Reeves* in concluding that the record evidence, viewed in a light most favorable to Place, does not sustain the conclusion that Place's October, 1991 transfer or IME requirement were in retaliation for her having engaged in protected activity.

II. THE RELIEF REQUESTED BY PLACE'S PETITION CANNOT BE AWARDED.

Place asks this Court to summarily reverse the Seventh Circuit's decision, or alternatively, to vacate the Seventh Circuit's decision and remand for reconsideration in light of *Reeves*. For the reasons stated above, this requested relief is not justified. However, Place's requested relief cannot be awarded for an additional reason. Place's petition wholly ignores a fundamental error identified by the Seventh Circuit in which the jury was improperly permitted to decide liability based on acts that occurred prior to the enactment of the CRA. *Place*, 215 F.3d at 807-09. Contrary to Place's arguments, the Seventh Circuit refused to find this error harmless. *Id.* at 808. Therefore, even if Place is correct regarding her interpretation of the *Reeves* decision (and she is not), her requested relief cannot be awarded. Rather, even if this case was remanded to the Seventh Circuit for additional consideration, the fundamental errors committed by the district court (for which Place has not requested review in this Court) would require, at a minimum, a new trial. Such an outcome would render this Court's review nugatory, and further justifies the denial of Place's petition.

III. THIS CASE DOES NOT PRESENT AN ISSUE OF GREAT NATIONAL IMPORTANCE; RATHER, THE FACT-SPECIFIC REVIEW PLACE SEEKS FROM THE COURT WOULD HAVE APPLICATION ONLY TO HER PARTICULAR CASE.

Place's half-hearted assertion in the closing half-page of her petition that this case involves issues of great national importance is meritless on its face. As stated above, the Seventh Circuit correctly applied Rule 50 standards as articulated in *Reeves*. Even if it did not, however, given this Court's decision in *Reeves*, there can be no legitimate claim that there remains confusion among the lower federal courts as to the proper standard of review in the Rule 50 context. Indeed, given *Reeves*' recent vintage, its articulation of the Rule 50 standard cannot be said to have sufficiently percolated through the lower courts as to reveal whether further analysis and explanation from this Court is warranted. At most, the instant petition for certiorari seeks an error correction, based on the application of established Rule 50 standards to the particular and isolated facts of this case, which is not an appropriate basis for the exercise of this Court's certiorari jurisdiction.

CONCLUSION

For all the foregoing reasons, the petition does not state a basis upon which the proposed writ of certiorari should be granted. Respondent respectfully requests that the petition be denied.

Respectfully submitted,

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